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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/532,024	03/21/2000	Akihiro Ogawa	1417-305	7475
23117	7590	09/01/2005	EXAMINER	
NIXON & VANDERHYE, PC 901 NORTH GLEBE ROAD, 11TH FLOOR ARLINGTON, VA 22203			WONG, LESLIE A	
			ART UNIT	PAPER NUMBER
			1761	
DATE MAILED: 09/01/2005				

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/532,024

Applicant(s)

OGAWA ET AL.

Examiner

Leslie Wong

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 23 June 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-9 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-9 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bernhardt (EP 0236288) in view of Rule (US Patent No. 4419378), Babayan (US Patent No. 4093750), and Talkington et al (US Patent No. 4960602) for the reasons set forth in rejecting the claims in the last office action. The amendments to the claims are not seen to influence the conclusion of unpatentability previously set forth.

Bernhardt discloses the use of polyglycerol fatty acid esters and sugar fatty acid polyesters in dairy products including milk (see entire document, especially page 14, lines 3-12). Bernhardt also discloses that esterification can be done by any method known in the art that requires the desired rheological properties (see page 12, lines 21-26).

The claims differ as to the recitation of a specific cloud point.

Rule (US Patent No. 4419378) discloses a milk-containing beverage comprising polyglycerol esters of fatty acids (see entire patent). Rule also discloses the manipulation of the esterification to obtain the desired product (see column 4, lines 3-45).

Babayan (US Patent No. 4093750) disclose beverages containing a polyglycerol ester of a fatty acid (see entire document).

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Talkington et al (US Patent No. 4960602) disclose the use of sucrose fatty acid esters in foods and beverages.

The specific cloud point is no more than obvious to that of the prior art. In the absence of a showing to the contrary the manipulation of the cloud point is well-within the skill of the art and merely dictated by the desired final product.

It would have been obvious to a person of ordinary skill in the art, at the time the invention was made, to manipulate polyglycerol fatty acid esters as taught by Rule (US Patent No. 4419378), Babayan (US Patent No. 4093750), and Talkington et al (US Patent No. 4960602) in the milk product of Bernhardt because the use and manipulation of polyglycerol fatty acid esters in milk products is conventional in the art.

It is noted that once the art has recognized the use of a component such as polyglycerol fatty acid esters in foods and beverages the use and manipulation in specific foods and beverages would be no more than obvious and expected to one of ordinary skill in the art.

Applicant's arguments filed June 23, 2005 have been fully considered but they are not persuasive.

Applicant argues that there is no motivation to combine the references.

The prior art clearly teaches the use of polyglycerol fatty acid esters in milk products (Bernhardt as cited above) and the use of small amounts as admitted by Applicant (page 7, paragraph 4).

In the absence of a showing to the contrary the manipulation of the cloud point is well-within the skill of the art and merely dictated by the desired final product

In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, the prior art is directed to the conventional use of polyglycerol fatty acid esters in food products.

Applicant further argues emulsion stability and calorie reduction. Applicant does not claim emulsion stability or calorie reduction.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Leslie Wong whose telephone number is 571-272-1411.

The examiner can normally be reached on Tuesday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Leslie Wong
Primary Examiner
Art Unit 1761

LAW
August 31, 2005